Senior Federal Counsel by way of a preliminary objection contended that the procedure adopted by the applicant-company was incorrect because, he submitted, the only remedy applicant-company could have asked for on the authorities of *Mersing Omnibus Co. Sdn. Bhd.* v. *Minister of Labour and Manpower & Anor.*,[1] *Gnanasundram* v. *Public Services Commission.*[2] *Sungai Wangi Estate* v. *UNI*[3] and the case of *Pemungut Hasil Tanah, Kuantan* v. *Oriental Rubber & Palmoil Sdn. Bhd.*[4] was an order of certiorari to quash the proceedings as there was merely an error on the face of the record which made the proceedings only voidable and not void. Counsel for the applicant-company, however, argued in reply that the lands had been acquired not only in contravention of Article 13 of the Federal Constitution in that the applicant-company had been deprived of property not in accordance with law but also in contravention of the rules of natural justice in that the applicant-company had not been made a party to the acquisition proceedings. She further contended that it had not been possible for the applicant to have applied for certiorari because it was time-barred by virtue of Order 53 rule 1A of the Rules of the High Court 1980, a factor which clearly prevailed upon Senior Federal Counsel when he raised his preliminary objection.

In the light of Senior Federal Counsel's admission of the relevant facts in the applicant's affidavits, I agreed with counsel for the applicant-company that the acquisition of the lands had taken place contrary to the provisions of the Act and in breach of the fundamental rules of natural justice and I was of the view that the applicant-company had made out a case that its constitutional right might have been impinged contrary to Article 13 thus entitling the applicant-company to seek a declaration. In any event, I did not think that I should refrain from exercising my discretion in allowing the applicant-company to proceed with its application for a declaratory remedy in order to prevent injustice in this particular case especially when the only procedure advocated by Counsel for the respondent was rendered unavailable to the applicant-company through effluxion of time by the default of the respondent. I did not think it was right that the applicant-company should be shut out in limine and I accordingly overruled the preliminary objection and directed that the proceedings continue.

Order accordingly.

Solicitors: *Kam Woon Wah & Co.*

CHUA NEOH KOW v. MALAYAN BANKING BHD.

[A.C.J. (Shankar J.) September 14, 1985]

[Johore Bahru – Civil Appeal No. 5 of 1981]

Banking Law – Cheque – Letter to stop payment – Oral countermand – Bank honoured cheque despite – Breach of duty by banker – Damages – Evidence Act, 1950, ss. 65 & 66.

Banking Law – Cheque dishonoured – "Drawer's seal not according to specimen" – Wrongful dishonour – Damages.

In this appeal, the appellant ("Chua") appealed against the decision of the learned Magistrate dismissing his two claims against the respondent ("the Bank"). The first claim was in respect of a cheque for $500 which Chua drew on April 12, 1978. He claims that, contrary to his instructions written in Chinese to stop payment of this cheque, the Bank honoured this cheque. The second claim was in connection with a cheque for $250 which he drew on May 9, 1978 ("the May Cheque"). The Bank refused to honour the May cheque when presented for payment although he had adequate funds in the account to meet it on the ground that the "drawer's seal (was) not according to the specimen." Chua claimed damages for breach of duty on the part of the Bank. The learned Magistrate dismissed both claims. On appeal to the High Court.

Held, allowing the appeal with costs: (1) the learned Magistrate placed undue emphasis on the mistake in the identification of the name of the Malay gentleman to whom Chua said he handed the stop-payment letter. Chua also told a bank officer Ng to stop payment. In all the circumstances, the Bank was in breach of its duty to Chua. A countermand may be given orally, and Chua must have judgment on the first claim;

(2) had the learned Magistrate appreciated the full significance of Chua's letter dated March 27, 1978, he would not have found as he did. That letter constituted a specimen of Chua's new rubber stamp and his change of address. Judgment must be given for Chua on the second claim;

(3) on the first claim, judgment for Chua for $500 with interest thereon at 8% p.a. from April 14, 1978. On the second claim, judgment for $2,000 for Chua, with interest thereon from May 15, 1978 at 8% p.a.

Case referred to:

(1) *Westminster Bank* v. *Hilton* (1927) 136 L.T. 315.

CIVIL APPEAL.

Ho Thian Cheh for the appellant.

S. Balasekaran for the respondent.

Cur. Adv. Vult.

Shankar J.: This is an appeal from a decision of the learned Magistrate at Kluang whereby he

dismissed two claims made by the appellant (hereafter referred to as "Chua") against Malayan Banking Berhad (hereafter referred to as "the bank").

The first of these claims was in respect of a cheque for $500 which Chua drew on April 12, 1978. He claims that on April 14, 1978 he called at the bank and handed over a letter written in Chinese containing instructions to stop payment of this cheque (hereafter referred to as "the April cheque") but the bank honoured this cheque. The second claim is in connection with a cheque Chua drew on May 9, 1978 for $250 (referred to hereafter as "the May cheque"). When this cheque was presented for payment the defendant declined to honour it even though there were adequate funds in the account to meet it. The bank's explanation is that the "drawer's seal" was not according to the specimen. Chua claimed damages for these acts which he alleges were in breach of the bank's duty to him as their customer.

The learned Magistrate dismissed both the claims. His reasons for doing so have been attacked before me on a variety of grounds.

The big picture, so far as the first claim is concerned, is that it was Chua's contention that the April cheque had been issued by way of a part payment for goods which were to be delivered on April 13, 1978. The goods did not arrive on time and after consulting a relative it was decided by both of them that a letter should be written in Chinese to the bank to stop payment. This was done.

On April 14, 1978 both Chua and his relative went to the bank. There they saw a Mr. Ng Eng Lim the second officer in the bank. Chua said he showed Ng the letter and told him that he wanted to stop payment of the April cheque. Ng did not read the letter. Instead he asked Chua to go to a Malay gentleman in the bank. Chua saw that Malay gentleman for the first time and even though he did not know his name then, he said in his examination-in-chief that he got to know that his name was Encik Khalid. This Malay gentleman told Chua after an immediate investigation that the April cheque had not yet arrived but that when it did payment would be stopped. After that Chua banked in 3 cheques. The Chinese letter was left with this "Encik Khalid." All this was witnessed by Chua's relative who also gave confirmatory evidence in court to that effect.

On May 3, 1978 Chua received his bank statement and discovered that his instructions for stopping payment had not been followed. Once again he went to the bank with his relative and saw Mr. Ng. He complained about what happened. The Malay officer to whom the plaintiff had spoken was not to be seen. Mr. Ng explained the absence by stating that the Malay gentleman in question was a relief officer from Johore Bahru. He handed Chua a photocopy of the cheque and said that the matter would be investigated.

Chua gave his evidence in the court below on September 3, 1980. So did his relative. The case was then adjourned. On October 15, 1980 hearing was resumed. The Magistrate together with counsel and the party visited the bank's premises to make some observations. When they returned to court an application was made to recall Chua to give further evidence. This was granted and Chua stated on oath that during the court's visit to the bank earlier that morning he had seen the Malay relief officer in the bank to whom he claimed that he had handed the Chinese letter aforesaid and that he had established that the name of the gentleman was not Khalid as he had testified at the earlier hearing but was in fact Abdul Hamid Abdullah who was then called and identified as the man in question. Chua's claim was that he had made an honest mistake in the identification of the name of this gentleman but that, that day was the second time he had seen him and that he was positive that he was the person to whom the countermand letter had been handed on April 14, 1978. The bank's response to all this evidence was a total denial. It was claimed on their behalf that Chua had not seen any bank officer on April 14, 1978, that he had not issued any instruction to countermand payment of the April cheque, and that no letter of any kind had been handed in.

Mr. Ng gave evidence denying that he had met Chua on April 14, 1978. Abdul Hamid bin Abdullah also denied that the plaintiff had spoken to him and further stated that on the day in question he was not in Kluang but in Johore.

In the circumstances of this case, the only issue was whether the plaintiff had taken effective action to countermand payment of the April cheque.

It is well established that an appellate court will not lightly interfere with findings of fact made by a lower tribunal but this is not such a case. The learned Magistrate placed undue emphasis on the

mistake in the identification of the name of Malay gentleman to whom Chua said he handed the stop-payment letter. The judicial reasoning here was that since the learned Magistrate accepted Abdul Hamid's denial that he was in Kluang on the day in question, no letter could have been handed to him. And since Chua himself had admitted that Khalid was not the man to whom the letter was handed, it therefore followed that there was no evidence on which he could find that any letter had been handed in at all. But with respect to the learned Magistrate the direct and the circumstantial evidence in this case pointed to the one and only conclusion that the letter had been handed in. In addition to the oral testimony of Chua and his relative of the events on April 14, there was also the further evidence of the events on or about May 3, 1978 when Chua went in to complain about the passing of a cheque which he had countermanded. Mr. Ng when he gave evidence for the bank did not deny that this conversation had taken place. Nor did he say anything on that day suggesting that Chua had not handed in the letter. There was also the conversation about the absence of the relief officer to whom Chua said he had handed in the stop payment letter. In my view this evidence corroborated Chua's case to a very material degree. What was there for Mr. Ng to investigate, if in fact the case for the bank was that Chua had not come in on April 14, 1978 at all to hand in any letter?

To further strengthen Chua's case is the letter to the Manager of the bank on May 10, 1978. This letter set out every material ingredient of Chua's claim in respect of the April cheque. Encik Abdul Hamid Abdullah's name was specifically mentioned in the letter as the person to whom the countermanding letter had been handed. But once again the reply of the bank Manager dated May 27, 1978 was not a denial of liability along the lines of the evidence presented in Court but a bland response that:-

"We are looking into the allegation made by your client and will inform you of our decision in due course."

The state of play at the close of Chua's case therefore was such that it was for the defendants to rebut the plaintiff's case. Some of the bank's officers denied that there were proper attendance registers in 1978 but the bank Manager categorically stated that documentary evidence pertinent to whether a particular officer had been at work on a particular day could be verified from attendance registers which were in use in 1978 and also from a personal file of the officer concerned. The omission to produce these documents, when there was evidence before the learned Magistrate to show that they were available for production, should have been an added factor in the scales against the bank, since the onus of proof on this point had clearly shifted to them.

Admittedly Encik Abdul Hamid bin Abdullah produced some specimens of the kind of letters which were issued to him and he was required to go on assignment as a relief officer from Johore Bahru where he was stationed to other bank branches in the State but this was clearly not enough since in cross-examination he had stated that he was not sure whether these letters were all the letters that he had and that there could be other letters. What it came down to therefore was that the relevant witnesses for the defence were relying wholly upon their memory in claiming that Chua had not seen then on April 14, 1978. All these factors which militated against the defence version, were not taken into account by the learned Magistrate in deciding the issue against the plaintiff. Had he done so I have no doubt that he would have come to the correct conclusion namely that the plaintiff did go to the bank on April 14, 1978 and that he did hand in a letter in which the plaintiff thought that he had adequately given an effective notice for the cheque to be countermand. At this point however, there is a difficulty. Chua did not keep a copy of the letter. It is possible but unlikely in the ordinary course of events that a Malay bank officer would have been able to understand a letter written in Chinese. The law is that to be effective the countermand must not be expressed in ambiguous terms; it must unequivocally refer to the particular cheque which is stopped. (See *Westminster Bank* v. *Hilton*[1]).

Admittedly secondary evidence can be given of the contents of a document when the original is in the possession or power of the person against whom the document is sought to be proved and when after the notice mentioned in section 66 of the Evidence Act such person does not produce it. (See section 65 of the Evidence Act, 1950). There is no indication before this court that the required notice under section 66 of the Evidence Act 1950 was given and without the document itself before me it is not possible to come to a finding as to whether the terms in which the letter was couched were ambiguous or otherwise. Had the matter ended there, I would have felt compelled to dismiss Chua's appeal in regard to the April cheque. However Chua also gave evidence that he had told Mr. Ng that he wanted to stop payment of the cheque.

As to what was said to the Malay officer, Chua said:-

"I showed him my letter and told him I wanted to stop payment of the cheque. I told him also of the date, the cheque number and the amount. He asked me why. I told him the reason. After I told him the reason he asked me to wait for a while for him to check whether the cheque had arrived or not.

Later he told me that the cheque had not arrived yet. He also told me that I could stop payment of the cheque."

The evidence of the plaintiff's witness on the point was even more specific. He said:-

"As far as I can recall the plaintiff said, 'Saya mahu tahan itu cheque.'

The officer said, 'Apa pasal.'

Plaintiff said, 'Saya ada satu barang janji mahu datang semalam – tapi tak sampai.'

Officer said, 'Ini boleh. Tapi mahu pergi tengok ini cheque datang dulu.'

"Then he made a search and found that cheque not yet arrived. The officer told us that the cheque could be stopped payment. The plaintiff then handed over the letter to the officer."

The effect of this verbal testimony to my mind is that not only was the countermand expressed in unambiguous terms but also it unequivocally referred to a particular cheque and the Malay officer in question had no difficulty in understanding which was being referred to and what he was asked to do in respect of it. The reaction of the plaintiff when he received his bank statement, to find that the cheque had been paid, is equally corroborative evidence that the notice had been given and was so understood by the bank's officers.

Next I must consider whether to be effective a countermand may be oral. Mr. Ho for the appellant said it could and that the test was whether the notice was adequate. He did not submit any authority for the proposition.

Paget on the Law of Banking, 8th Edition at page 314 states that when a cheque is stopped by telephone, the proper course for the banker is to return the cheque with an answer indicating the state of affairs and the cause, so as not to damage the customer's credit, and requesting re-presentation, and communicate with the customer asking for confirmation, unless the banker can satisfy himself that the person communicating with him is really the customer. This indicates to me that the countermand may be oral and that provided the bank is in no doubt that the verbal instructions have originated from the customer and the notice is unambiguous and unequivocably refers to the particular cheque, then the banker must stop payment.

One last point which I must touch upon in connection with the first claim is the reliance which Mr. Bala for the bank placed upon the presumption relating to Banker's books. It was his contention that because Chua's ledger card did not contain any reference to any countermanding instruction relating to the April cheque, it therefore followed that no such instruction had in fact been given. With respect the law is that the Banker's books can be received as *prima facie* evidence only of the matters, transactions and accounts therein recorded provided they are first properly proved. The books are not evidence of matters not recorded therein.

In all the circumstances I am constrained to hold that the bank was in breach of its duty to the plaintiff and he must therefore have judgment on the first claim.

I must now turn to the second claim made by Chua. The evidence which he submitted in support of it was as follows. The account was opened on July 18, 1973 and the specimen signature showed a rubber stamp in the name of Chop Yen Choon, No. 55 Main Road, Simpang Rengam, Johore all in Roman characters with its equivalent in Chinese characters supplemented with the handwritten signature of the appellant.

On March 27, 1978 Chua wrote a formal letter to the Manager of the bank in which he gave notice that he wished to change the address of his shop from 55 Main Road, Simpang Rengam, Johore to No. 2 Jalan Sin See, Simpang Rengam, Johore. He specified the account number and requested the Manager to keep the letter in record. It was signed by him and his new rubber stamp was also put on the letter. This new rubber stamp contained only the name Chop Yen Choon in Roman characters and its Chinese equivalent and nothing else except a dotted line for the plaintiff's signature.

Thereafter Chua issued 9 cheques for various amounts between April and May 9, 1978 carrying the serial numbers from 879029 up to 879038. Everyone of these was affixed with the new rubber stamp and Chua's signature. The cheque number 879030 is the April cheque earlier referred to which was honoured by the bank despite the countermand.

The last of the cheques carries the number 879038 for $200, is dated May 8, 1978 and was cleared on May 9, 1978. But the cheque bearing serial number 879039 for $250 which was similarly signed and presented for payment on May 15, 1978 was rejected by the bank and the holder was given a formal notice that the cheque had been returned for the reason "drawer's seal not according to specimen." Chua's claim is that this rejection came out of the blue without any warning.

The bank's officers who gave evidence stated that they had verbally informed the plaintiff that unless he rectified his seal so as to bring it in line with the specimen the bank would have no option but return his cheques. They say that Chua undertook to use his seal in conformity with the specimen but when they found that their repeated requests to do so were ignored they decided on May 15, 1978 that the time had come for them to act as they did.

In his cross-examination earlier Chua had completely denied any such suggestion and asserted that no such request had ever been made to him by the bank.

The learned Magistrate elected to believe the defendant's witnesses on the point.

It is with the utmost regret that I must differ with him. Once again I feel obliged to state that had the learned Magistrate appreciated the full significance of Chua's letter dated March 27, 1978, he would not have found as he did. That letter constituted a specimen of Chua's new rubber stamp and his change of address. Nowhere in cross-examination or in the testimony of the bank's officers was the existence of this letter refuted. What was the point in asking Chua to revert to a chop on the original specimen card which no longer represented his proper address? Beside the course of conduct followed by the bank after that letter fully supports Chua's version.

If indeed the bank felt so strongly about the variance between the new chop and the old one, the proper thing for the bank to do was to ask Chua to execute a new specimen card for their records. This they did not do.

In the circumstances the line of reasoning which was advanced for the learned Magistrate finding on the second claim cannot, with respect, be sustained.

The last issue with which we are concerned is the measure of damages Chua should be awarded.

On his first claim I hold that all he is entitled to is the $500 which he lost and there will therefore be judgment for him for that sum together with interest thereon at 8% per annum from April 14, 1978.

As to the second claim it was contended in the court below and before me that the proper measure of damages should be the sum of $10,000/-. No authority whatsoever was produced to substantiate this. There was no evidence of any special damages sustained by the appellant. The only evidence was a letter from the holder of the May cheque that all future dealings between him and the plaintiff would have to be for terms cash because of the problem which arose on this occasion. Counsel referred to *Paget's* Law of Banking 8th Edition at page 312 where it is stated:-

> "Theoretically, substantial damages may be given against the bank without proof of actual loss to customer, and in many cases large sums have been awarded. But a more recent view appears now to have gained favour. It is contended that the presumption of necessary serious injury only applies where the customer is a businessman, and that, at least in other cases, actual damage must be pleaded and proved."

There is evidence before me that Chua is a businessman but the positive evidence that he sustained substantial damage is very skimpy. Thus the measure of the damages which is to be awarded must be based on a presumptive loss. On the other hand the reason given for the rejection here is not one which makes any direct aspersions on his credit worthiness.

I therefore feel that the sum of $2,000 is adequate damages under this head and interest thereon will run from May 15, 1978 at 8% per annum also.

The bank will have to pay the costs of this appeal and in the court below.

Appeal allowed.

Solicitors: *Ho Thian Cheh & Co.; Bala & Co.*